

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0015**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On November 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from October 22, 2017 to November 4, 2017 (decision # 110104). Claimant filed a timely request for hearing. On December 11, 2017, ALJ Lewis conducted a hearing, and on December 12, 2017, issued Hearing Decision 17-UI-98818, concluding claimant was not available for work from October 22, 2017 through November 18, 2017. On January 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) During 2017, Rivers Edge Hotel & Spa employed claimant as a lead restaurant server at its Portland, Oregon hotel restaurant. Claimant customarily worked swing shift for the employer.

(2) During the fall term of 2017, claimant attended school full-time, taking several post baccalaureate classes in order to qualify for a Master's program to become a secondary school teacher. Claimant's attended three classes in person each Tuesday and Thursday from 10:00 a.m. to 11:50 a.m., 2:00 p.m. to 4:00 p.m. and 4:40 p.m. to 6:30 p.m. Claimant's school attendance did not interfere with her employment with the employer which was flexible regarding work hours.

(3) The employer scheduled a major remodel of the restaurant to occur during October and November 2017. The employer laid claimant off on October 23, 2017 and notified her that she could expect to return to work on November 15, 2017.

(4) On October 26, 2017, claimant filed an initial claim for unemployment insurance benefits, effective October 22, 2017. When she filed her claim by telephone, she told a Department employee about her expected return to work date but added that she could not immediately return to full-time work because of her school attendance.

(5) Claimant filed weekly claims for and was denied unemployment insurance benefits for the weeks including October 22, 2017 through November 18, 2017 (weeks 43-17 through 46-17), the weeks at issue.

(6) During the weeks at issue, claimant sought work as a restaurant server by maintaining contact with her employer. Claimant's labor market was the Portland metropolitan area. The customary days and hours for work as a restaurant server in claimant's labor market were all days, day and swing shifts.

(7) During the weeks in issue, claimant continued to attend her scheduled classes on Tuesdays and Thursdays. On November 6, 2017, claimant completed and returned a Department form asking if she would be willing to change her class hours to accept work and she replied that she was not. She also replied that her classes were not available during other hours or days. During the weeks at issue, claimant was unwilling to give up her classes to attend work.

**CONCLUSIONS AND REASONS:** Claimant was not available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c).<sup>1</sup> An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work full time, part time and accept temporary work opportunities during all of the usual hours and days of the week customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

It is generally accepted that an individual seeking unemployment insurance benefits while regularly attending school has a "heavy burden" to overcome the inference that she (or he) was not available for work.<sup>2</sup> That inference may be overcome with unequivocal and consistent testimony by the claimant, particularly when corroborated by other evidence, that she prioritized finding work over attending school and would resolve any scheduling conflicts in favor of work.<sup>3</sup> Claimant, having initially been denied benefits, has the burden to establish she was eligible for benefits for the weeks at issue.<sup>4</sup>

Claimant failed to meet her burden. Claimant initially told the Department in a student eligibility questionnaire that she would not drop school for work in the event of a conflict and her testimony at hearing was consistent with that. However, claimant testified at hearing that she had been a server for 12 years and that she had never had a problem working or obtaining work due to school conflicts because restaurant employers consistently accommodated its employees regarding school attendance.

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<sup>1</sup> Claimant's ability to work and her work search activities are not at issue. On this record, it appears that claimant was, at all relevant times, physically and mentally capable of working, and that she actively sought work during the weeks claimed.

<sup>2</sup> See *Petro v. Employment Div.*, 32 Or. App. 17, 20, 573 P.2d 1250 (1978), citing *Callaghan v. Morgan*, 9 Or. App. 116, 120, 496 P.2d 55 (1972) (so stating).

<sup>3</sup> *Petro*, 32 Or. App. at 20; see accord *Minniti v. Employment Div.*, 18 Or. App. 44, 523 P.2d 1060 (1974); *Minniti v. Employment Div.*, 21 Or. App. 356, 535 P.2d 99 (1975).

<sup>4</sup> See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Regardless, it is well settled that unemployment insurance benefits are intended for individuals who are unemployed through no fault of their own and sufficiently attached to their labor market in such a way as to maximize their opportunities for re-employment and minimize the period of unemployment.<sup>5</sup> The Department's eligibility requirements set forth in ORS 657.155(1)(c) and OAR 471-030-0036 are mandatory in nature and require the individual claimant to prioritize work over most other considerations, actual or hypothetical, as a condition of receiving benefits.<sup>6</sup> Among those mandatory factors, a claimant seeking work performed on all days and during all shifts must, during any week claimed, maintain her willingness to seek, accept and perform work on all days and during all shifts, in the event work is offered by a potential employer. Because claimant was attending a full class schedule during the days and hours she was seeking work and was unwilling to drop classes to accept work, she failed to satisfy that criteria.

Claimant was not available for work during the weeks at issue. Consequently, she is not eligible for benefits for the weeks including October 22, 2017 through November 18, 2017 (weeks 43-17 through 46-17).

**DECISION:** Hearing Decision 17-UI-98818 is affirmed.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service:** February 2, 2018

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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<sup>5</sup> The purpose of the availability requirement is to restrict benefits to those individuals who are unequivocally attached to the labor market. *Minniti v. Employment Division*, 21 Or App 356, 535 P2d 99 (1975); *accord* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311.

<sup>6</sup> Benefit Manual § 301 (eligibility factors are positive requirements which claimants must meet as a condition of eligibility for benefits in any week claimed); *see e.g.* OAR 471-030-0036(1) (Director authorized to require claimant to seek particular types of work, including "less desirable or similar work," as a condition of receiving benefits); OAR 471-030-0036(3)(d) (claimant ineligible if absent from the labor market for more than half the week); OAR 471-030-0036(3)(f) (claimant ineligible for missing an opportunity to work due to illness); OAR 471-030-0036(3)(g) (claimant ineligible if she fails to seek the type of work the Director required); OAR 471-030-0036(4) (claimant ineligible if incapable of working more than one shift to provide care for her dependent child).